

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

No. 33225

HELEN P. WALKER,
Plaintiff Below, Appellee,

V.

OPTION ONE MORTGAGE CORPORATION,
A CORPORATION, AND
H & R BLOCK MORTGAGE CORP.,
A CORPORATION,
Defendants Below, Appellants.

FILED

June 7, 2007

released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appeal from the Circuit Court of Kanawha County
Honorable Charles E. King, Judge
Civil Action No. 03-C-1937

REVERSED AND REMANDED

Submitted: April 18, 2007
Filed: June 7, 2007

Kenneth E. Tawney
Amber L. Hoback
Kevin T. Wills
Jackson & Kelly PLLC
Charleston, West Virginia
Attorneys for the Appellants

Bren J. Pomponio
Daniel F. Hedges
Mountain State Justice, Inc.
Charleston, West Virginia
Attorneys for the Appellee

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.
JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “““A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court’s discretion in ruling upon a motion for leave to amend.’ Syl. Pt. 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W.Va. 222, 161 S.E.2d 250 (1968).” Syl. Pt. 5, *Poling v. Belington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999).’ [Syllabus Point 1,] *Boggs v. Camden-Clark Memorial Hosp. Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004).” Syllabus Point 1, *Jones v. Sanger*, 217 W.Va. 564, 618 S.E.2d 573 (2005).

2. “““The provisions for impleader under Rule 14(a), West Virginia Rules of Civil Procedure, . . . are within the sound discretion of the trial court” Syl. Pt. 5, in part, *Bluefield Sash & Door Co., Inc. v. Corte Constr. Co.*, 158 W.Va. 802, 216 S.E.2d 216 (1975), *overruled on other grounds*, *Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977).’ Syl. pt. 5, in part, *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990).” Syllabus Point 2, *State ex rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003).

3. “The purpose of the words ‘and leave [to amend] shall be freely given when justice so requires’ in Rule 15(a) W.Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the

absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.” Syllabus Point 2, *State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (2005).

4. “The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.” Syllabus Point 3, *State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (2005).

Per Curiam:

The appellants herein and defendants below, Option One Mortgage Corporation [hereinafter, “Option One”] and H & R Block Mortgage Corporation [hereinafter, “H & R Block”],¹ appeal from an order entered July 7, 2005, by the Circuit Court of Kanawha County. By that order, the circuit court denied the appellants’ motion to file a counterclaim and a third-party complaint. On appeal to this Court, the appellants argue that the circuit court abused its discretion by denying their motion. Upon a review of the parties’ arguments, the record designated for appellate consideration, and the pertinent authorities, we agree and reverse the decision of the circuit court.

I.

FACTS

On April 29, 2002, the plaintiff below and appellee herein, Helen F. Walker [hereinafter, “Ms. Walker”], was approved for a mortgage loan with H & R Block to enable her to purchase a house. At the time of her application, Ms. Walker represented that she had \$18,000 to use as a down payment for the purchase. H & R Block contends that the fact that Ms. Walker intended to make a down payment in this amount substantially contributed to its

¹For ease of reference, Option One and H & R Block will also be referred to collectively as “the appellants.”

decision to approve her application for a \$46,963.38² mortgage loan. Following this transaction, H & R Block assigned Ms. Walker's loan to its affiliated assignee, Option One.

Thereafter, Ms. Walker defaulted on her loan, and the appellants sent her a reinstatement quote requesting payment of \$6,530 in order to avoid foreclose on her home. On August 7, 2003, Ms. Walker filed a lawsuit against the appellants in the Circuit Court of Kanawha County alleging predatory lending practices and seeking cancellation of the loan, among other relief. By answer filed December 15, 2003, the appellants denied all of the charges against them and asked the circuit court to dismiss the case with prejudice. They did not assert any counterclaims in that pleading. Pursuant to the April 27, 2004, original scheduling order, May 15, 2004, was set as the deadline date to file third-party complaints, while counterclaims were not mentioned in that order. In addition, November 1, 2004, was set as the discovery cut-off date, while January 24, 2005, was set as the original trial date.

On October 29, 2004, the appellants took the depositions of Ms. Walker and her daughter, Paula Walker Paul [hereinafter, "Ms. Paul"]. During this testimony, counsel for the appellants began to question the source of Ms. Walker's \$18,000 down payment for her home. Upon further investigation and the receipt of subpoenaed bank records on December 8, 2004, counsel began to suspect that such monies had been illicitly obtained by

²The appellants claimed the actual loan amount financed was \$50,100, but the circuit court determined this calculation to be inaccurate.

Ms. Paul from her former employer.³ Counsel for the appellants alerted both Ms. Paul's former employer and counsel for Ms. Walker of their suspicions. On January 26, 2005, counsel for the appellants informed counsel for Ms. Walker that this information may lead them to file a counterclaim and a third-party complaint. Ms. Paul's former employer undertook its own investigation and, on March 21, 2005, turned the matter over to law enforcement authorities.

On April 4, 2005, the appellants filed their "Motion to File Counterclaim and Third-Party Complaint" that is the subject of this appeal.⁴ On July 7, 2005, the circuit court denied the appellants' motion concluding "that the deadline for filing third party complaints passed nearly fourteen months ago on May 15, 2004 and [Appellants] have failed to provide good cause why the deadline should be extended." From this ruling, the appellants now appeal to this Court.⁵

II.

³Ms. Walker testified that these funds were part of the monies she received in her divorce settlement.

⁴Ms. Walker died on May 11, 2005. By order entered August 1, 2005, Ms. Paul, as executrix of her mother's estate, was substituted as the party plaintiff in this case. However, the style of the case has remained unchanged. Therefore, for ease of reading, we will continue to refer to Ms. Walker as the appellee.

⁵On November 22, 2006, Ms. Walker moved to dismiss the instant appeal based upon the September 26, 2005, and March 6, 2006, rulings by the circuit court. This Court denied that motion by order entered January 24, 2007.

STANDARD OF REVIEW

We have been called upon to determine whether the circuit court erred by not permitting the appellants to file a third-party complaint. In Syllabus Point 1 of *Jones v. Sanger*, 217 W.Va. 564, 618 S.E.2d 573 (2005), this Court held that:

““A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court’s discretion in ruling upon a motion for leave to amend.” Syl. Pt. 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W.Va. 222, 161 S.E.2d 250 (1968).’ Syl. Pt. 5, *Poling v. Belington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999).” [Syllabus Point 1,] *Boggs v. Camden-Clark Memorial Hosp. Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004).

Moreover, in Syllabus Point 2 of *State ex rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003), we explained that:

““The provisions for impleader under Rule 14(a), West Virginia Rules of Civil Procedure, . . . are within the sound discretion of the trial court’ Syl. Pt. 5, in part, *Bluefield Sash & Door Co., Inc. v. Corte Constr. Co.*, 158 W.Va. 802, 216 S.E.2d 216 (1975), *overruled on other grounds*, *Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977).” Syl. pt. 5, in part, *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990).

With these standards in mind, we now consider the parties’ arguments.

III.

DISCUSSION

On appeal to this Court, the appellants raise a single assignment of error challenging the circuit court's denial of its motion to file a counterclaim and a third-party complaint. Because these two proposed filings constitute two distinct pleadings against two separate parties, we will consider separately the propriety of the circuit court's rulings denying the appellants' motion to file a counterclaim and the appellants' motion to file a third-party complaint.

A. Compulsory Counterclaim

The appellants first complain that the circuit court erred by denying their motion to file a compulsory counterclaim against Ms. Walker to allege fraud in her acquisition of the underlying mortgage. In support of their position, the appellants rely upon Rule 13 of the West Virginia Rules of Civil Procedure which provides, in relevant part:

(a) *Compulsory counterclaims.* — A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal

judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

. . . .

(f) *Omitted counterclaim.* — When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires the pleader, he may by leave of court set up the counterclaim by amendment. . . .

In sum, the appellants argue that the circuit court erred by denying their motion to file their counterclaim against Ms. Walker because the counterclaim was compulsory and thus was required to be brought in this action. Moreover, the purpose of Rule 13 requires that they be permitted to assert their counterclaim in order to avoid fragmented litigation. *See Sorsby v. Turner*, 201 W.Va. 571, 575, 499 S.E.2d 300, 304 (1997) (“The purpose of Rule 13 is to ‘prevent the fragmentation of litigation, multiplicity of actions and conserve judicial resources.’” (citation omitted)). Additionally, if the appellants are not permitted to assert this claim, it will be deemed waived because it is compulsory in nature. *See Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 47, 70, 207 S.E.2d 897, 920 (1974) (“Failure to assert a compulsory counterclaim is a waiver and abandonment of such a claim and an adverse decision to the putative claimant is *res judicata*.”).

The appellants further claim that they have not been dilatory in asserting their counterclaim against Ms. Walker insofar as they did not discover their claim against her until long after their original answer was due and had been filed. They further contend that they

have satisfied the requirements of Rule 15(a) of the West Virginia Rules of Civil Procedure which direct that “a party may amend the party’s pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” In further support of their position, the appellants rely upon the recent decision of this Court in *State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (2005), in which we held, in Syllabus Points 2 and 3, respectively, that:

The purpose of the words “and leave [to amend] shall be freely given when justice so requires” in Rule 15(a) W.Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.

The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.

By contrast, Ms. Walker contends that the circuit court did not abuse its discretion by denying the appellants’ motion to file a counterclaim when they had waited approximately six months from first learning of the basis for which they filed their motion; nearly fourteen months had passed from the original date to amend pleadings until the time

of the hearing on this motion; and only six weeks remained before the scheduled trial date. Finally, Ms. Walker states that she does not know what relief the appellants now seek insofar as her underlying judgment against the appellants has resulted in a judgment in her favor, which judgment also has been satisfied.

After thoroughly reviewing the record and considering all of the parties' arguments, we find that the circuit court abused its discretion in not allowing the appellants to file a compulsory counterclaim. Permitting the appellants to assert their counterclaim would have resulted in presentation of a more complete picture of the underlying facts in this action. Moreover, it is clear to us that Ms. Walker had ample time to respond to the counterclaim by the fact that when the appellants moved the circuit court to file the counterclaim in April 2005, the trial was still approximately five months away, in September 2005. Furthermore, we find no evidence that the appellants were dilatory in presenting their counterclaim. The appellants told Ms. Walker's counsel of their possible intent to pursue a counterclaim in December 2004 and January 2005 if their investigation uncovered wrongdoing on the part of Ms. Walker or Ms. Paul. They did not know for certain that the down payment funds had been illegally obtained until March 2005, when Ms. Paul's former employer completed its investigation and informed the appellants' counsel that the matter was going to be turned over to the police. Upon learning this information, the appellants filed their motion to assert their counterclaim fourteen days later.

We believe that fourteen days was certainly a reasonable amount of time for the appellants to file their motion to assert a counterclaim. Filing a counterclaim before they knew whether or not a crime had occurred by Ms. Walker or Ms. Paul would have been irresponsible. For instance, had Ms. Paul's employer discovered that no embezzlement had occurred, and had the appellants recklessly filed a claim making such serious allegations against her and Ms. Walker, the parties may have suffered unnecessary and irreconcilable damage to their credibility. With that in mind, we believe that the appellants acted responsibly in waiting for the results of Ms. Paul's employer's investigation. Furthermore, we would be remiss if we did not point out that but for the misrepresentations with regard to where the \$18,000 originated, the appellants would have discovered the misconduct giving rise to their counterclaim much sooner. Accordingly, the appellants should have been permitted to file their counterclaim against Ms. Walker.

B. Third-Party Complaint

The appellants also allege that the circuit court erred by denying their motion to file a third-party complaint against Ms. Paul, individually, for her role in helping Ms. Walker to illicitly acquire the underlying mortgage, including improperly obtaining monies from Ms. Paul's former employer for the \$18,000 down payment. In support of their position, the appellants rely upon Rule 14(a) of the West Virginia Rules of Civil Procedure which states:

(a) When defendant may bring in third party. — At any

time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party defendant plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party for all or part of the claim made in the action against the third-party defendant.

As to the circuit court's denial of their motion to file a third-party complaint, the appellants contend that they demonstrated "good cause" as required for the modification of a court's scheduling orders entered pursuant to W.Va. R. Civ. P. 16(b). *See State ex rel. Pritt v. Vickers*, 214 W.Va. 221, 227, 588 S.E.2d 210, 216 (2003) ("Trial courts should not

permit parties to obtain extensions absent a showing of good cause.”). The appellants claim that they have satisfied the required showing of good cause because their delay in moving to file the pleading was not due to their negligence or wrongdoing, but rather was attributable to the time at which they discovered Ms. Paul’s wrongdoing due, in part, to her misrepresentations as to the source of the down payment funds.

After learning, in December 2004, that the down payment monies had most likely been illicitly obtained by Ms. Paul, the appellants claim that they diligently investigated the matter before filing their motion due to the seriousness of their allegations against Ms. Paul and the potential criminal nature of the alleged misconduct. Upon their receipt of the bank records in December 2004, the appellants assert that they met with Ms. Paul’s former employer, who then began its own investigation, and asked counsel for Ms. Walker to reopen Ms. Paul’s deposition, which request was denied. In January 2005, counsel for the appellants learned that Ms. Paul’s former employer was continuing its investigation and alerted counsel for Ms. Walker that they might file a counterclaim and a third-party complaint. After learning, on March 21, 2005, that Ms. Paul’s former employer had turned its investigation over to the police, counsel for the appellants filed, fourteen days later on April 4, 2005, their motion to file a third-party complaint against Ms. Paul.

Ms. Walker responds that the circuit court properly denied the appellants’ motion to file a third-party complaint against Ms. Paul because they had waited

approximately six months from first learning of the basis therefor to file their motion; nearly fourteen months had passed from the original date to amend pleadings until the time of the hearing on this motion; and only six weeks remained before the scheduled trial date. Finally, Ms. Walker states that she does not know what relief the appellants now seek insofar as her underlying judgment against the appellants has resulted in a judgment in her favor, which judgment also has been satisfied, and counsel for Ms. Walker represents Ms. Paul only in her representative capacity, not individually.

In consideration of the foregoing, we do not believe that permitting the appellants to file a third-party complaint against Ms. Paul would have prejudiced either Ms. Walker or Ms. Paul insofar as the only additional issues to be determined were whether Ms. Paul embezzled money from her former employer and whether Ms. Walker and Ms. Paul then used that money to obtain the mortgage in question. Moreover, as discussed earlier, any resultant prejudice is of Ms. Walker's and Ms. Paul's own making insofar as they did not truthfully reveal the source of the down payment monies when they were questioned during their depositions. Finally, we believe that permitting the third-party complaint in this case would further the purpose of Rule 14 "to eliminate circuitry of actions when the rights of all three parties center upon a common factual situation." Syllabus Point 3, in part, *Magnet Bank v. Barnette*, 187 W.Va. 435, 419 S.E.2d 696 (1992). See also *Howell v. Luckey*, 205 W.Va. 445, 449, 518 S.E.2d 873, 877 (1999) ("[O]ne of the primary goals of any system of justice [is] to avoid piecemeal litigation which cultivates a multiplicity of suits and often

results in disparate and unjust verdicts.”). Consequently, we find the appellants’ arguments persuasive and therefore believe that the circuit court abused its discretion in denying the appellants’ motion to file a third-party complaint against Ms. Paul.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Kanawha County entered on July 7, 2005, is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.